Filed 8/25/15 In re Mora CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re EDUARDO NAVA MORA, on Habeas Corpus.	E061823 (Super.Ct.Nos. INF1102708, INF1301141) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Harold W. Hopp, Judge. The petition is granted in part and denied in part.

Melanie K. Dorian, under appointment by the Court of Appeal, for Petitioner and Defendant.

Kamala D. Harris, Attorney General and Kimberley A. Donohue and Teresa Torreblanca, Deputy Attorneys General, for Respondent.

INTRODUCTION

Petitioner and defendant Eduardo Mora seeks a nine-year reduction in his current 15-year prison sentence, which was increased because of a prior conviction from 2012.

In 2012, in case number INF1102708, defendant pled guilty to being a felon in possession of a firearm (Pen. Code, §12021, subd. (a)(1))[1] and participating in a criminal street gang (§186.22, subd. (a)), for which he received a 16-month sentence. Shortly after this 2012 conviction, our Supreme Court held in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*) that a defendant cannot be convicted for participating in a criminal street gang when he or she acts alone.

Defendant is currently serving 15 years in prison after a jury convicted him in 2013, in case number INF1301141, of residential burglary (§ 459) and receiving stolen property (§ 496). The trial court found true that he had two prison term priors (§ 667.5, subd. (b)). The trial court also found true that defendant had a serious felony prior (§ 667, subd. (a)) and a strike prior (§§ 667, subds (b)-(i), 1170.12), both based on the 2012 gang participation conviction. The court sentenced defendant to 15 years in prison as follows: four years for the residential burglary, doubled for the strike, plus five years for the serious felony prior, plus two years for the prison term priors. The sentence for receiving stolen property was stayed pursuant to section 654. Defendant seeks to have this court reduce his sentence to six years because the 2012 conviction was for conduct that our Supreme Court later determined does not constitute a crime.[2] For the reasons discussed below, we grant the petition in part and deny it in part. First, we set aside the

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[1] All section references are to the Penal Code unless otherwise indicated.

[2] As the People suggested at oral argument, we deem this petition to be filed as to both cases, INF1102708 and INF1301141, so that we can provide more effective relief.

2012 conviction for gang participation. Second, we vacate the judgment in the 2013 conviction, but remand it to the trial court for resentencing.

FACTS AND PROCEDURE FOR THE 2012 CONVICTION

On the afternoon of December 8, 2011, defendant was arrested after running from deputy sheriffs in a residential neighborhood and dodging into several back yards. The jacket that defendant dropped just feet from where he was apprehended had in one of its pockets a .22 caliber handgun and an expended casing. On defendant's person, deputies found thirty-six .22 caliber casings and one expended .22 caliber casing. It was later discovered that defendant had attempted to enter one of the residences by kicking in a side garage door, causing damage to the door and tripping the alarm system.

Defendant admitted to running from the deputies because he did not want to be caught with a gun. He stated he panicked and may have accidentally kicked in the side door of a garage, but denied attempting to enter the residence.

Defendant also admitted that the previous day, December 7, 2011, he and a friend named "Jose" entered a different residence intending to commit burglary, but defendant left without taking any items because Jose was taking too long. Deputies located a report of a burglary on that date at the address specified by defendant. The designated case number on the report was Y113410021. A witness identified defendant as the man he saw walking away from the area where that residence was located, carrying a black duffle bag and avoiding his glance.

Defendant told deputies that he formerly associated with a particular criminal street gang, and acknowledged having the gang's tattoo on his forearm, but stated he no longer associated with the gang.

On January 26, 2012, the People filed an amended felony complaint charging defendant with the following five offenses, each committed "on or about December 8, 2011." The counts of the amended felony complaint are as follows: (1) Being a felon in possession of a firearm (§ 12021, subd. (a)(1)); (2) being a felon in possession of ammunition (§ 12316, subd. (b)(1)); (3) vandalism (§ 594, subd. (b)(1)); (4) obstructing an officer (§ 148, subd. (a)(1)); and (5) active participation in a criminal street gang (§ 186.22, subd. (a)).

On February 8, 2012, defendant pled guilty to being a felon in possession of a firearm and participating in a criminal street gang, in exchange for a 16-month state prison sentence.

DISCUSSION

Defendant asks this court to reduce his current sentence by nine years. The gang participation prior from 2012 was used as a strike prior to double his four-year sentence for residential burglary and as a serious felony prior to add five years. Defendant contends that, because the California Supreme Court determined in late 2012 that a person acting alone does not violate the gang participation statute, and because the facts that conclusively show he acted alone are outside the record of his 2013 conviction, he is entitled to habeas relief.

In *People v. Mutch* (1971) 4 Cal.3d 389, 396 (*Mutch*) our Supreme Court reiterated that "a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct.' [Citations.]" Here, the *Rodriguez* court determined that the gang participation statute, section 186.22, subdivision (a), applies only where the defendant acts in concert with another gang member, not when he acts alone.

In *In re Crumpton* (1973) 9 Cal.3d 463, 468 (*Crumpton*), our Supreme Court extended the rule in *Mutch* to convictions like that of defendant that were obtained by guilty plea, again where the undisputed evidence shows the defendant did not commit the crime of which he was convicted.

On December 27, 2012, the California Supreme Court decided *Rodriguez*. In that case, the court noted that one of the elements of a violation of section 186.22, subdivision (a) is the willful commission of "an act that 'promotes, furthers, or assists in any felonious criminal conduct by members of [the] gang.' (§ 186.22(a).)" (*Rodriguez, supra,* 55 Cal.4th at pp. 1130-1131.) Our Supreme Court held that this element "requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. [Citation.]" (*Id*. at p. 1132.) The court reasoned that "[t]he Legislature . . . sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony with at least one other gang member." (*Id*. at p. 1134.) Thus, a gang member does not

violate section 186.22, subdivision (a) if he acts alone in committing an underlying felony. (*Ibid.*)

We must then determine whether there is a material dispute as to the facts relating to defendant's conviction for active participation in a street gang; that is, regarding whether defendant acted alone.

The People argue the petition should be denied for the following three reasons, including that there is a material dispute as to the facts relating to defendant's 2012 conviction, which reasons we will discuss and answer in turn. First, citing *People v.* Allen (1999) 21 Cal.4th 424, 440-443, and *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 963 the People assert defendant can collaterally challenge the 2012 conviction only on the bases that he was completely deprived of counsel in violation of *Gideon v. Wainwright* (1963) 372 U.S. 335 or was not advised of his rights to a jury trial, silence, and confrontation under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, and his current claim is neither of these. We have reviewed these cases and find them inapplicable. Neither addresses whether a defendant can file a petition for habeas corpus to challenge a prior conviction on the ground that what defendant admitted was not a crime. Further, as discussed above, our Supreme Court in *Mutch* and *Crumpton* specifically authorized such a challenge, even where the defendant pled guilty.

Second, the People assert defendant is eligible for habeas relief for the 2012 conviction only if he is still in custody for that conviction, including constructive custody such as parole— suffering collateral consequences such as a sentencing enhancement in a

subsequent conviction is not constructive custody. The People cite to *People v. Villa* (2009) 45 Cal.4th 1063, 1068-1069, which holds that a petitioner who is a resident alien is not considered to be in state custody for state habeas corpus purposes when he is taken into federal immigration custody after having served his state prison sentence, even where the state conviction formed the basis for the federal immigration custody. We note, however, that even this case that the People cite as supporting its position contains language directly supporting the conclusion that defendant is in fact still in custody: "But when an offender's recent sentence is lengthened as a result of a prior conviction, the offender's custody is directly attributable to the prior conviction." (*Id.* at p. 1074) This is exactly the case here, in that defendant's 2013 sentence was lengthened by nine years as a result of his 2012 prior conviction. Thus, even under this case cited by the People, defendant is currently in state custody as a result of the 2012 conviction.

Third, the People contend there *is* a material dispute as to the facts relating to his gang participation conviction, and thus habeas relief is not available. Specifically, the People assert that the record is not clear because defendant pled guilty before a preliminary hearing could be held, and so there is no way to determine for certain on which of two crimes the gang participation conviction was based. Further, the People refer to a police report, discussed below, which points to a burglary that defendant may have committed on December 7, 2011, with a person defendant called "Jose." The People further argue that, because defendant did not attach to his petition a copy of the charging document from the 2012 case, "it is impossible to know if the gang participation

charge resulted from the December 7, 2011 burglary with 'Jose,' or petitioner's possession of a weapon and ammunition while running from police on December 8, 2011."

To determine whether such a material dispute does in fact exist, we have closely reviewed the following documents, which are either attached as exhibits to the petition and to defendant's letter reply, or found in the record in the direct appeal of the 2013 conviction, in case number E060674, of which we take judicial notice. First, the "prior packet" for the 2012 criminal street gang conviction is found in the supplemental clerk's transcript in the direct appeal of the 2013 conviction. This includes the operative complaint dated January 26, 2012, the felony plea form dated February 8, 2012, and the case print.

Second, Exhibit A to the petition, contains the initial incident report of defendant's arrest on December 8, 2011, prepared by Deputy Heredia and a supplemental report by Deputy Koedyker, both dated December 8, 2011.

Third, Exhibit B, attached to defendant's letter reply is a declaration by defendant's appointed trial counsel that the prosecution supplied to him during discovery only the following three documents: the two reports dated December 8, 2011, by Deputies Heredia and Koedyker discussed above as Exhibit A; and the "gang packet" described below as Exhibit C, which the People gave to trial counsel on January 26, 2012. Trial counsel swears under penalty of perjury that the People provided him with

only these three documents during discovery, and that he provided copies of each to defendant's appellate counsel.

Fourth, Exhibit C is the "gang packet" prepared by Deputy Acevedo at the People's request.

Fifth, Exhibit D is the declaration of appellate counsel that trial counsel provided her with only the three documents specified above, and that no additional police, incident or investigatory reports in connection with the 2012 case were contained in the client file.

We note that the file or case number for the burglary on December 7, 2011 is Y113410021 and that this case number appears only once in the above materials, where it is mentioned in Deputy Heredia's report on his contacts with defendant on December 8, 2011. In that report, Deputy Heredia relates that defendant told him that, the day before, defendant went to a residence to commit burglary with a man named "Jose" but left without taking anything. Deputy Heredia links defendant's story to a burglary that took place on December 7, 2011, about which he found a burglary report with the assigned case number Y113410021. This case number is mentioned nowhere else in either the record in the related appeal or the materials submitted by the parties.

The amended felony complaint in the 2012 case, filed January 26, 2012, states that each of the charged offenses was committed "on or about December 8, 2011." None of the offenses are described as taking place on December 7.

On December 19, 2011, Deputy Sheriff Acevedo authored a report or "gang packet" to supplement the investigation of defendant for burglary and being a felon in

possession of a firearm and ammunition, specified as "File Number Y113420027". In the report, Deputy Acevedo specifies in the "PURPOSE" section of the report that "I was asked by the District Attorney's (DA) Office to review the previously mentioned case and circumstances. This report contains information in support of a gang enhancement for the identified suspect, Eduardo "Bozo" Mora, who is an active member of the [VCR] criminal street gang." The report references case number Y113420027 at the top of each of its 15 pages. On page two, the report references four additional case reports, none of which matches the case report for the burglary on December 7, 2011. On pages four and five of the report, Deputy Acevedo specifies in the "CASE SYNOPSIS" section only the events of December 8, 2011. The report does not at any point mention the events of December 7. Again on pages 13 and 15, the report indicates that Deputy Acevedo's opinion as to defendant's gang membership and motivation relates specifically to the charges of burglary and felon in possession of a firearm and ammunition. In both instances, the term "burglary" is used in a manner to indicate a single burglary, not multiple burglaries. Overall, this report clearly indicates that it pertains to the offenses occurring on December 8, 2011, with no mention, at all, of offenses committed on any other date.

Our review of the above documents shows that there is not a material dispute as to the facts behind defendant's 2012 conviction for participating in a criminal street gang. For this reason, and the others discussed above, we conclude that defendant is entitled to

be resentenced in the 2013 case without enhancements for the 2012 gang participation conviction.

DISPOSITION

The petition for writ of habeas corpus is granted in part and denied in part. Defendant's conviction in case number INF1102708 for violating section 186.22, subdivision (a), is hereby set aside. We also vacate the judgment of conviction in case number INF1301141 and remand to the trial court for resentencing. The clerk of the superior court is directed to amend the abstract of judgment for each case accordingly, and to forward the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.